Supreme Court, U.S.
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No. 96-1687

In the

Supreme Court of the United States

October Term, 1996

PAUL N. ISENBERGH, JR., and ERIC E. ISENBERGH,
as co-personal representatives of the
Estate of PAUL ISENBERGH

Petitioners,

vs.

KNIGHT-RIDDER NEWSPAPER SALES, INC., n/k/a
NEWSPAPERS FIRST, INC. and KNIGHT-RIDDER, INC.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITIONERS REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

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INTRODUCTION

Respondents misapplied the laws governing substitution of parties in an effort to avoid review by this Court of a decision which is in direct contravention of the *Hicks/Burdine* paradigm.[1] Further, respondents' suggestion that the co-personal representatives of Paul Isenbergh, his sons, are not proper parties to this case is without merit.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

I. IN SUGGESTING THAT THE CO-PERSONAL REPRESENTATIVES OF THE ESTATE OF ISENBERGH ARE NOT PROPER PARTIES, RESPONDENTS MISAPPLIED THE APPELLATE AND SUPREME COURT RULES GOVERNING SUBSTITUTION UPON DEATH.

Petitioners are proper parties to this action because respondents failed to file a motion for substitution of party at the appellate level and the Supreme Court rules governing substitution of parties do not apply under these facts.

Paul Isenbergh, the original claimant, died after a notice of appeal was filed, but before the Court of Appeals for the Eleventh Circuit issued its first opinion on June 11, 1996. Although respondents were aware of appellant, Paul

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[1] *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993) and *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981).

Isenbergh's death,[2] they never filed a motion for substitution of a party. *See* Fed. R. App. P. 43(a). Rule 43(a) does not mandate substitution of a party once death occurs. However, it does provide that "the personal representative of the deceased party *may* be substituted as a party on motion filed by the representative[3] or *by any party.*" Fed. R. App. P. 43(a)(emphasis added.)

The Supreme Court rules governing substitution of parties only applies if death occurs *after* a writ of certiorari is filed. *See* Sup. Ct. R. 35.1. Because Isenbergh died prior to filing a writ of certiorari, this rule does not apply. Respondents have conceded this fact in their Brief in Opposition. (Resp. 9, n.5). Thus, the six month limitation for substitution after death does not apply under these circumstances.

As to appellate rules governing substitution of a party upon death, the court of appeals does have the authority to dismiss an appeal if no substitution is made under certain conditions. First, a motion for substitution of a party or suggestion of death on the record must be made. *See* Fed. R. App. P. 43(a); *Gamble v. Thomas,* 655 F.2d 568 (5th Cir. 1981). Additionally, if injunctive relief were the only item at issue and no motion or suggestion were made, the court of

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[2] Respondent Knight-Ridder, Inc., is a newspaper publisher in one of whose papers, *The Miami Herald*, the obituary was published. *The Miami Herald*, March 4, 1996, B4.

[3] Unlike a representative of an actual party, "the attorney for the decedent has no authority to suggest the death of his or her client [the decedent] upon the record." *See Smith v. Planas,* 151 F.R.D. 547 (S.D.N.Y. 1993).

appeals might dismiss the action because dismissal would have no affect on the relief. *See Crowder v. Housing Authority*, 908 F.2d 843 (11th Cir. 1990).[4]

Another situation that can warrant dismissal is one in which no survivor or heir is interested in pursuing the appeal. The Court of Appeals for the Fifth Circuit dismissed an appeal on such grounds. *Gamble v. Thomas*, 655 F.2d 568 (5th Cir. 1981). In that case, the appellees suggested on the record, through a letter to the court, that the appellant died. *Gamble*, 655 F.2d at 568. The clerk's office wrote to various survivors of the decedent to determine if any survivor desired to pursue the appeal. *Id.* No response was received. *Id.* at 568-69. Although the court dismissed the action because of the lack of interest of the decedent's heirs, the court recognized that the rules do not contain an express provision requiring dismissal of the appeal. *Id.*

In the instant case, the survivors of the decedent desire to have this Court review the court of appeals' affirmation of the district court's decision to nullify a jury verdict: the trial judge, and then the appellate panel, chose to believe the employer's explanation even in the face of evidence that the appeals court stated in its initial, later-withdrawn opinion, created issues of fact. (Pet. App. 20a-35a). Petitioners, the personal representatives and sons of the decedent, are not seeking mooted injunctive relief, but rather, review of a $250,000 jury award in back pay for intentional age

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[4] In *Crowder*, the injunctive relief was pursued through the co-appellant who continued to pursue the appeal. 908 F.2d at 846, n.1.

discrimination that would belong to the estate.[5] Thus, the co-personal representatives have a direct interest and are proper parties to file the writ of certiorari.

If respondents wished to have the plaintiff/appellant's estate substituted as a party, they should have made their motion or suggestion of death at the appellate level, rather than attempting to bullet-proof an appeals court victory by first keeping silent and then trying to play "gotcha" when the personal representatives petition for certiorari. "If a party . . . desires to limit the time within which another may make the motion [for substitution], he may do so by suggesting the death on the record." *Rende v. Kay*, 415 F.2d 983 (D.C. Cir. 1969)(citing the committee notes for Fed. R. Civ. Pro. 25(a)[6])(emphasis omitted). Failing to have done that, respondents can not now seek dismissal of the writ on procedural grounds using Supreme Court Rules which are inapplicable. *See* Sup. Ct. R. 35.1.

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[5] Actions brought pursuant to the ADEA survive the claimant's death. *See Slade v. United States Postal Service,* 952 F.2d 357 (10th Cir. 1991)(stating claimant's Title VII action survived after the death of claimant). Because the legislative history of the ADEA only offers "general guidance," law applicable to Title VII cases is often used to analyze ADEA claims. *See Western Airlines, Inc. v. Criswell,* 472 U.S. 400 (1985)(interpreting an ADEA case based on authority from a Title VII action).

[6] Appellate Rule 43(a) is modeled after F.R.C.P. 25(a). Wright, Miller & Cooper, FEDERAL PRACTICE AND PROCEDURE § 3989 (1996).

The purpose of the rules governing substitution of parties upon death was not to dismiss otherwise meritorious claims. *Rende,* 415 F.2d at 986 (citing *Staggers v. Otto Gerdau Co.*, 359 F.2d 292, 296 (2d Cir. 1966). This Court interprets these rules liberally, and with flexibility in permitting substitution. *Rende,* 415 F.2d at 986 (citing *Roscoe v. Roscoe,* 379 F.2d 94, 99 (1967). The appeals court judgment should be reviewed by this Court and certiorari should not be denied because the action is brought by the personal representatives of the original plaintiff/appellant.

CONCLUSION

Based on the authorities cited and the arguments presented, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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